No. 11,418

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LAWRENCE WAREHOUSE COMPANY (a corporation),	*Appellant,*
vs.	
DEFENSE SUPPLIES CORPORATION,	*Appellee.*
CAPITOL CHEVROLET COMPANY (a corporation),	*Appellant,*
vs.	
DEFENSE SUPPLIES CORPORATION,	*Appellee.*
V. J. McGREW,	*Appellant,*
vs.	
DEFENSE SUPPLIES CORPORATION,	*Appellee.*
DEFENSE SUPPLIES CORPORATION,	*Appellant,*
vs.	
CLYDE W. HENRY,	*Appellee.*

BRIEF OF APPELLANT LAWRENCE WAREHOUSE COMPANY IN REPLY TO BRIEF OF DEFENSE SUPPLIES CORPORATION.

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STATEMENT OF THE CASE.

A. THE FACTS.

In its Statement of the Facts, Appellee, Defense Supplies Corporation, has inadvertently confused the chronology of events. The so-called "Idle Tire Purchase Plan" for the collection of surplus rubber tires was initiated by the Government in the early months of 1942. The original agreement between the Government and the Lawrence Warehouse Company was dated prior to October 1, 1942, and the agreement between Lawrence Warehouse Company and Capitol Chevrolet Company (Plaintiff's Exhibit 11, Tr. 341) was dated October 1, 1942. This agreement between the Lawrence Warehouse Company and the Capitol Chevrolet Company was in "the form of all agency agreements which Defense Supplies Corporation provided to the Lawrence Warehouse Company for use in dealing with its agents." (Tr. p. 110.) The actual receipt of tires commenced on October 15, 1942. (Tr. p. 139.)

On January 22, 1943, the Defense Supplies Corporation wrote a letter of instructions to the Capitol Chevrolet Company, in which the Government agency instructed the Capitol Chevrolet Company as follows:

> "You are requested not to permit any one to enter the warehouse premises where tires are stored for account of this corporation for any reason whatsoever, other than authorized appraisers or properly identified employees of this Corporation."

At the time of this letter the Capitol Chevrolet Company was operating eleven warehouses in Sacramento in every conceivable kind of vacant space.

The Defense Supplies Corporation decided to consolidate the storage of tires in one building. A large wooden building located in West Sacramento was available for that purpose.

> "Said warehouse known as the 'Ice Palace' was leased by defendant Capitol Chevrolet Company from Clyde W. Henry and Constantine Parella for use as a warehouse for the storage of tires, after inspection of said 'Ice Palace' by plaintiff prior to said lease and with the consent, approval and authorization of plaintiff for the leasing of said premises and their use for the storage of tires and tubes."
>
> (Finding of Fact IV-A, Tr. p. 80.)

The lease between Capitol Chevrolet Company and Appellant Henry and Constantine Parella was dated March 1, 1943 and contained, among others, the following provisions:

> "that no alterations, repair or change whatever shall be made in or about said leased premises without the written consent of the Lessor." (Plaintiff's Exhibit 6, Tr. p. 328.)

Said Lessor had the right

> "at all times during the term of this lease to enter said leased premises for the purpose of examining or inspecting the same and of making such repairs or alterations therein or in other parts of said building as said Lessor shall deem

necessary in connection with said premises or said building." (Plaintiff's Exhibit 6, Tr. p. 331.)

On the same date, March 1, 1943, the Defense Supplies Corporation addressed a letter to the Lawrence Warehouse Company approving storage in the so-called "Ice Palace." (Plaintiff's Exhibit 7, Tr. p. 310.)

Thereafter the Defense Supplies Corporation prepared a list of "Men Eligible to Enter DSC Warehouse". That list included the President of Capitol Chevrolet Company, the warehouse foreman employed by Capitol Chevrolet Company, the chief tire appraiser employed by Defense Supplies Corporation, the real estate operator who had negotiated the lease between Capitol Chevrolet Company and the owners; the owners of the property, the Supervisor of Capitol Chevrolet Company; and 9 individual tire pilers and stackers, all employed by Capitol Chevrolet Company. No officer or employee of the Lawrence Warehouse Company was named on that list. No officer or employee of Lawrence Warehouse Company was named in the previous letter of instructions of January 22, 1943, from Defense Supplies Corporation to Capitol Chevrolet Company. (Plaintiff's Exhibit 9.) On January 22, 1943, the Defense Supplies Corporation directed a letter to Lawrence Warehouse Company in which they advised the Lawrence Warehouse Company that Mr. Kenyon of the Capitol Chevrolet Company had been instructed to permit no one to enter the warehouse premises where tires were

stored for the account of the corporation other than authorized appraisers or properly identified employees of the Defense Supplies Corporation.

The Defense Supplies Corporation desired that the premises and the tires stored therein be guarded twenty-four hours a day and approved of the Burns Detective Agency as an independent agency to furnish such guards. The Lawrence Warehouse Company employed the Burns Detective Agency and paid for the watchmen, and the Defense Supplies Corporation reimbursed the Lawrence Warehouse Company. (Tr. pp. 284-5-6.)

In its statement of the facts (Brief for Appellee, p. 3), the Defense Supplies Corporation states that while the Appellant McGrew was using an acetylene torch in cutting up a steel tank in the engine room adjoining the warehouse premises, a fire started in the engine room and spread to the main building where the tires and tubes were stored. The only testimony upon the question is that of McGrew and his testimony is that he neither saw nor smelled any evidence of fire at the time he was using the torch and that, when he first observed the fire, it was some eighteen feet from the spot where he had previously used the torch (Tr. pp. 240-241), and was in the southeast corner of the engine room. (T. p. 248.) He had no idea of the source of the fire. (Tr. p. 249.)

The other witness, who saw the fire in its early stage, was Mr. Kissell, the Burns watchman. He first saw it about ten feet east of the concrete fire wall on

the south end of the storage building, that is to say, about ten feet east of the engine room and in the storage building. (Tr. p. 298.)

The trial Court evidently did not believe the testimony of McGrew or Kissell, notwithstanding that Kissell was the plaintiff's witness and the fact that it was the only testimony in the record relating to the place at which the fire started. The trial Court assumed that McGrew's use of the torch caused the fire and then upon this assumption premised that the use of the torch was negligent.

B. THE ISSUES.

THAT CERTAIN OF THE FINDINGS OF FACT ARE CONFLICTING AND ARE OPPOSED TO EACH OTHER AND THEREFORE CANNOT SUPPORT THE CONCLUSIONS OF LAW OR THE JUDGMENT.

In its statement of the issues raised by Appellant, Lawrence Warehouse Company (Brief, p. 5), Appellee, Defense Supplies Corporation, fails to mention the contention that certain of the findings of fact are conflicting and opposed to each other and, therefore, cannot support the conclusions of law based thereon or the judgment. This issue, argued in Appellant's Opening Brief at pages 14, 15 and 16, is also ignored in the argument presented by Appellee, Defense Supplies Corporation. We believe the argument to be sound and that it disposes of Appellee's case, but, in view of the fact that it is not disputed, we will pass the point without further comment.

THERE IS NO EVIDENCE OF ACTUAL NEGLIGENCE ON THE PART OF LAWRENCE WAREHOUSE COMPANY.

In its brief, Appellee does not argue that there was any substantial evidence of actual negligence on the part of Lawrence Warehouse Company.

LAWRENCE WAREHOUSE COMPANY IS NOT LIABLE AS PRINCIPAL FOR AN ACT OF ITS AGENT OUTSIDE THE SCOPE OF THE AGENT'S AUTHORITY.

As an attempted answer to that portion of the brief of Lawrence Warehouse Company in which it was argued that there was no substantial evidence of such negligence, the Appellee, Defense Supplies Corporation, now argues that:

(a) Capitol Chevrolet Company was negligent in permitting the entry of McGrew;

(b) Capitol Chevrolet was an agent of Lawrence Warehouse Company for the storage of tires;

(c) Lawrence Warehouse Company was therefore liable as principal for the negligence of its agent Capitol Chevrolet.

In support of this theory, the Defense Supplies Corporation relies upon California Civil Code, section 2338, which provides:

"A principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal."

ARGUMENT.

There are several answers to the argument so advanced by Defense Supplies Corporation:

First: It is not supported by the Findings of Fact. There is no finding that the acts of Capitol Chevrolet Company, which are alleged to have constituted negligence, were performed by that company as an agent of Lawrence Warehouse Company or that the acts were within the scope of the agency.

In Finding III (Tr. p. 79), the Court finds that the Defendant McGrew negligently operated an acetylene torch and set fire to the premises.

Finding IV sets forth that McGrew was given permission by the Defendant Henry to enter the premises and remove the tank.

In Finding V, the Court found that Defendants Lawrence Warehouse Company and Capitol Chevrolet Company failed and omitted to exercise reasonable care and that said defendants negligently permitted the use of the torch on the premises and negligently failed to see that the torch was used in the proper manner. The finding concludes that, by reason of such negligence and carelessness, the premises and the plaintifi's goods were consumed and destroyed by fire.

In Finding VI, the Court found that the negligence of McGrew, Lawrence and Capitol Chevrolet concurred and joined together to destroy the plaintiff's goods.

It will be immediately noted that there is no finding that Lawrence Warehouse Company is charged as principal for the acts of its agent. It is elementary that if the principal is to be charged with the acts of its agent, the Court must first find that the acts of the agent were within the scope of the agent's authority. No such finding was made by the Court in the present case.

Second: The Court could make no finding that the Capitol Chevrolet in permitting McGrew to enter the engine room was acting within the scope of the agent's authority for the reason that the act of Capitol Chevrolet in permitting McGrew to enter the engine room on behalf of the owner to remove the tank owned by the owner was an act performed by Capitol Chevrolet Company in its relationship of tenant and not an act performed in the scope of its authority as custodian of the stored tires. Heretofore we have set forth the pertinent provisions of the lease between Capitol Chevrolet Company and the owner of the premises. The evidence is clear the Capitol Chevrolet Company permitted McGrew to enter the engine room only after obtaining approval of Mr. Turner, the real estate agent representing the owners, and also one of the persons who was on the list of persons authorized by the Defense Supplies Corporation to enter the premises. His purpose in entering the premises had nothing whatever to do with the adjoining building in which tires were stored. It was solely for the purpose of removing a tank belonging to the owner of the premises. In making

this statement, we have taken the evidence most favorable to Defense Supplies Corporation. It was the contention of the Capitol Chevrolet Company that they neither permitted nor knew of the intent or purpose to use an acetylene torch. The Capitol Chevrolet contended that the only authorization given by them was an authorization to permit Mr. Tony Sanchez and two of his men to enter and remove pipe and equipment (Tr. p. 339), and it is clear from the testimony of Mr. Henry that the pipe and equipment referred to on the card were removed several days before the fire. (Tr. p. 178.) The Defense Supplies Corporation authorized the Capitol Chevrolet Company to enter into the lease with Henry and Parella. In accordance with the terms of the lease Defense Supplies Corporation authorized Capitol Chevrolet Company to permit Henry, Parella and their real estate agent to enter the premises. (Plaintiff's Exhibit 10, Tr. p. 340.) The Defense Supplies Corporation contends that McGrew entered the premises with the approval of the Capitol Chevrolet Company. If so, that approval was given under the terms of the lease and after authorization by the agent of the owners. That authority was not given as agent of Lawrence Warehouse Company nor did the act of entering or removing the tank have anything whatsoever to do with the authority of Capitol Chevrolet Company as a custodian of the goods. The act of requesting authority of the owner indicates perfectly clearly that Capitol Chevrolet was acting pursuant to the terms of the lease and not pursuant to any agency agreement with Lawrence Warehouse Company.

There is a discussion of the authorities in the case of *Silverado Steamship Company v. Prendergast,* 31 Fed. (2d) 225, 226, by the Circuit Court of Appeals of this Circuit in which the Court states the rule as follows:

> "Generally a principal is liable for his agent's torts only if they are committed while the agent is carrying on his principal's business. If the agent steps aside from that business to promote purposes of his own having no connection with his employer's business, the relation of agency is for the time being and to that extent suspended."

Appellee attempts to answer this recognized rule by stating that the admitted lack of knowledge by Lawrence Warehouse Company of the entry of McGrew could not relieve it of liability for the alleged negligence of its agent. (Appellee's Brief, p. 27.) It is, of course, apparent that there were no circumstances sufficient to put Lawrence on inquiry.

> "In the absence of circumstances sufficient to put the principal on inquiry, the principal is not responsible for the torts of his agent which were committed outside of the course of the agent's authority, on the grounds that the principal by the exercise of diligence could have discovered the agent's misconduct in time to avoid injury to a third person."
>
> 3 *C. J. S.,* p. 190;
>
> *California Civil Code,* section 2339.

Third: The Appellee, Defense Supplies Corporation, by its own acts defined specifically the duties of the Lawrence Warehouse Company in connection with this particular warehouse.

(1) Defense Supplies Corporation inspected and approved the premises for the storage of tires;

(2) Defense Supplies Corporation authorized Capitol Chevrolet Company to lease the premises;

(3) Defense Supplies Corporation specifically designated by name the persons who could enter the premises, excluding any officer or employee of Lawrence Warehouse Company. It instructed Lawrence Warehouse Company to employ an independent agency to supply watchmen (and approved the particular watchmen employed and paid for those watchmen) as the only act to be performed by Lawrence Warehouse Company on the premises.

In its brief, at pages 27 and 28, Defense Supplies Corporation argues as follows:

> "Lawrence further states, on page 7 of its brief, that Capitol received instructions directly from appellee. This is directly contrary to the evidence which shows that written instructions regarding storage of the goods were delivered to Lawrence at the time of the execution of the storage agreement. (Tr. p. 105). There was evidence that appellee gave Capitol written instructions regarding the admission of persons to the premises (Tr. pp. 191-192), but similar instructions were given at the same time to Lawrence. (Tr. pp. 205-206.)"

Our statement that Capitol received its instructions directly from Defense Supplies Corporation is not directly contrary to the evidence. Plaintiff's Exhibit 9 was admittedly received directly from the Defense Supplies Corporation. Plaintiff's Exhibit 13, which

was a letter written by Defense Supplies Corporation to Lawrence Warehouse Company on the same day, advised Lawrence that specific and direct instructions had been given to Mr. Gordon Kenyon of Capitol Chevrolet Company. The instructions contained in Plaintiff's Exhibit 9 could not be more specific.

> "You are requested not to permit *any one* to enter the warehouse premises * * * for any reason whatsoever other than authorized appraisers or properly identified employees of this Corporation."

What better words of exclusion could be used, we cannot conceive. These instructions were given prior to the lease by Capitol Chevrolet of the Ice Palace. When the Defense Supplies Corporation approved the leasing of the Ice Palace by Capitol Chevrolet, it made assurance doubly sure by handing to Capitol Chevrolet a list of specifically named persons authorized by Defense Supplies Corporation to enter the premises. (Plaintiff's Exhibit 10, Tr. p. 340.)

Thus Defense Supplies Corporation did deal directly with the actual custodian and did give the actual custodian specific instructions. It also gave Lawrence Warehouse Company specific instructions and those instructions were to hire independent watchmen. It approved of the Burns Detective Agency as an independent agency to furnish watchmen and those watchmen were hired by Lawrence and Lawrence was reimbursed by Defense Supplies Corporation for their employment. By authorizing

the leasehold and by authorizing Capitol Chevrolet directly to permit the owners of the premises to enter under the terms of the lease, Defense Supplies Corporation, not Lawrence, authorized the agent of Lawrence to perform an act outside of the scope of the agency with Lawrence.

COULD THE ALLEGED NEGLIGENCE OF LAWRENCE WAREHOUSE COMPANY HAVE BEEN A PROXIMATE CAUSE OF THE DAMAGE?

While Appellee purports to answer the contention of this Appellant that the negligence of Lawrence as found by the trial Court was passive and could not therefore be concurrent with an active negligence to support the judgment (Appellant's Op. Brief, pp. 13-14; Appellee's Brief, pp. 29-30), it cannot escape its own admission that "Here the loss was caused by the use of an acetylene torch on the premises." (Appellee's Brief, pp. 9, 17.) It relies on this "cause" to avoid its further admission that Appellants would be relieved of liability for loss resulting from a "known defect in the premises", (Id. p. 9), or "where a bailor has knowledge of conditions under which the goods are stored." (Id. p. 17.) It will be recalled by the Court that counsel for Appellee stated, and the Court found (Tr. pp. 110-111; Finding of Fact IV-A, p. 80), that an employee of Appellee inspected the premises and had authorized their use under lease. The contract (Plaintiff's Exhibit 1, Tr. p. 310) between Lawrence and Appellee

provided for storage in the Ice Palace. It would be futile for Appellee to argue that it was not charged with knowledge of the conditions of the Ice Palace.

Defense Supplies Corporation also instructed exactly who was to be upon the premises and no one was permitted on the premises except the persons named by Defense Supplies Corporation in Plaintiff's Exhibit 10 and the approved watchman. Those persons were at lunch when the fire started except only the Burns watchman. If there were insufficient persons to attempt to control the fire, the fault was the fault of the Defense Supplies Corporation and not of Lawrence Warehouse Company.

The finding that Lawrence and Capitol Chevrolet omitted to provide adequate protection for the premises or to use reasonable care for the protection and preservation of the goods is clearly error. The Warehouse Company and the Capitol Chevrolet did what they were instructed to do by Defense Supplies Corporation.

The Appellee relies upon the case of *Runkle v. Southern Pacific Milling Co.,* 184 Cal. 714. As the Court states at page 719, that case turned upon the liability of the defendant for employing an "employee whom it knew was not competent * * * to be placed in charge of his warehouse and the property of the plaintiff therein". There is no such issue in the present case.

In *Taylor v. Oakland Scavenger Co.,* the Court held that the school authorities had a duty to super-

vise the children and to actively enforce the rules and regulations. The child was injured at a time when she was following the specific instructions given to her by the teacher. The injury, therefore, resulted from two active acts of negligence.

In the *Westover* case, the negligence for which the city was charged was permitting a defect in the street —one which could be reasonably anticipated to cause the type of injury suffered in that case.

In the *Mosley* case, also cited by Defense Supplies Corporation in its brief, the Court held that the defendant could reasonably have foreseen the risk inherent in wrongfully stacking the milk crates alongside a playground.

In the case at bar, the Lawrence Warehouse Company could not possibly have foreseen that the Capitol Chevrolet would permit McGrew to enter the premises with a blow torch, or that, if so permitted, McGrew would negligently use the torch.

At page 28 of its brief, Appellee suggests that this Appellant argues that, because it supplied watchmen, "it is therefore relieved from liability for the acts of its agent". We are unable to find any such argument in the brief submitted by this Appellant. The argument of Appellant in this connection is set forth on page 9 of its brief.

CONCLUSION.

We therefore respectfully submit that there is no evidence in the record to support a finding that the Lawrence Warehouse Company was negligent; that the brief filed on behalf of Appellee proceeds not upon the assumption that Lawrence was itself negligent but upon the proposition that an agent of Lawrence Warehouse Company was negligent, and that Lawrence Warehouse Company was responsible for the act of its agent; that there is no evidence in the record to support a finding that Capitol Chevrolet was negligent; and that there was no finding of fact or evidence to support a finding of fact that if Capitol Chevrolet was negligent, its negligence consisted of an act within the scope of its agency. That the finding of fact that the loss was caused by the affirmative act of McGrew is directly opposed to and contrary to the finding of fact that the loss resulted from concurrent negligence of McGrew, Lawrence and Capitol Chevrolet and is also contrary to the finding that the loss resulted from the negligence of Capitol Chevrolet and Lawrence Warehouse Company. That the negligence of Lawrence Warehouse Company, as found by the Court, and the negligence of McGrew, as found by the Court, cannot as a matter of law or of fact support a finding that the concurrent negligence of both resulted in the loss, for the reason that the affirmative, positive act of McGrew was found to be the proximate cause of the damage and that a proximate, affirmative act cannot as a matter of law concur with a mere passive failure to act.

It is also submitted that the evidence in this case is directly contrary to the Court's findings of fact with respect to the negligence of this Appellant and that the conclusions of law are not supported by the findings of fact and are contrary to said findings and that the judgment of the trial Court should be reversed.

Dated, San Francisco,
September 29, 1947.

Respectfully submitted,

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